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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

THE UNITED STATES OF AMERICA AND THE SECRETARY OF COMMERCE, AS SUCCESSOR OF THE CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION,

Petitioners,

v.

CALIFORNIA EASTERN LINE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATEMENT.

This is a case arising under Section 403(c)(2) of the Renegotiation Act of 1942, as amended,[1] wherein the Solicitor General, on behalf of the United States and the Secretary of Commerce, is asking this court to issue a writ of certiorari to review a judgment of the United States Court

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[1] Throughout this brief, unless otherwise specified, the terms "Renegotiation Act" and "the Act" refer to the Renegotiation Act of 1942, as amended, *Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; and by Public 149, 78th Congress, approved July 14, 1943.*

of Appeals for the District of Columbia Circuit which ordered and adjudged that their petition to that court for a review of a Tax Court decision on a question of coverage "be dismissed for lack of jurisdiction." *United States, et al.*, v. *California Eastern Line, Inc.*, 211 F. 2d 635; petition for a rehearing *en banc* denied by the court, *en banc*, March 12, 1954 (Petition, App. 21a-30a, 32a-33a).

For the reasons stated herein, respondent respectfully suggests to the court that the decision below was correct and that the petition for a writ of certiorari should be denied.

1. Perhaps the most cogent reason why a writ of certiorari should not be issued in this case is because the question presented is so unsubstantial as not to require further argument. The question, as stated by petitioner, is:

> Whether under the Renegotiation Act of 1942, as amended, the Court of Appeals for the District of Columbia Circuit has authority to review a determination by the Tax Court in a renegotiation case that a contract is not renegotiable because it was not made with the United States.

Considering the circumstances under which this case arose, the provisions of the Renegotiation Act, and the proceedings which have already been taken in connection with this and another related case, it seems obvious that, even if reviewed, the question presented would be answered in the negative; or, in other words, that the decision of the court below dismissing the Government's petition for a review is patently correct.

Briefly, the circumstances under which this case arose are as follows:

On March 29, 1941, California Eastern Line, Inc., as owner of the American steamship *Vermont*, entered into

a written contract signed by the British Ministry of War Transport, an agency of the British Government, as the other party. Under the contract, designated therein as a "charter", the vessel was employed to transport a cargo owned by the British Government from New York to Sudan, on the Red Sea. Respondent received payment for the service from lend-lease funds allocated to the Maritime Commission, upon presenting a certification from the British Ministry of War Transport that the services had been rendered in accordance with the contract. In 1943, more than two years after the *Vermont* had delivered her cargo to the British Government at Port Sudan, the Price Adjustment Board of the Maritime Commission commenced a renegotiation proceeding for the purpose of determining whether Respondent had derived any excessive profits under the charter. Although Respondent promptly notified the Board that its charter was not subject to renegotiation, because it was a contract with a foreign government and not with any "department" named in the Act, Respondent's objection to the proceeding was overruled. Six years later, in 1949, the Chairman of the Maritime Commission, purporting to act under authority of Section 403(c) of the Renegotiation Act of 1942, entered an unilateral order determining that respondent had realized excessive profits under the contract, which the Chairman determined to be "a contract with the Departments, as defined in the Renegotiation Act" (R. 15).

Respondent, following the mandatory and exclusive administrative procedure authorized by Section 403(e)(2) of the Act, as construed by this court in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 544 (1946), then filed a petition with the Tax Court of the United States asking for a "redetermination" of the amount of alleged excessive profits as unilaterally determined by the Chairman of the

Maritime Commission (R. 4-24). After issue was joined, by the filing of an answer on behalf of the Chairman, Respondent (as petitioner in the Tax Court proceeding) moved the Tax Court to "sever, and decide in the first instance, apart from any other issue raised by the pleadings, the basic issue of whether the specific contract referred to in [the Chairman's unilateral order] was a contract covered by the Renegotiation Act and subject to renegotiation by the Chairman of the Maritime Commission under authority of said Act" (R. 25-31). This motion was granted and, after a hearing on that severed [redacted] issue, the Tax Court made extensive and detailed findings of fact—most of them based upon stipulated facts and documents—and rendered an exhaustive opinion, 17 T. C. 1325 (1952). It found, *as the ultimate fact,* that: "The charter of the *Vermont* was neither a contract with the Commission or with any other department named in the Renegotiation Act, nor a subcontract under such a contract" (R. 278, 288), and then, upon the basis of its findings of fact, said in its opinion:

> "The contract in its terms supports petitioner's position on the first of these [coverage] issues, in that it purports to be a contract only between petitioner and an agency of the British Government. Respondent's reply is that in this matter the British Government acted as the agent of the United States Maritime Commission (to which we refer as the 'Commission'); that petitioner's contract was therefore with the Commission; and, since the Commission was one of the "Departments" named in the Act, that the contract was renegotiable. *The weight of the evidence, however, requires us to reject respondent's premise that the British Government acted as the Commission's agent, and to conclude that the contract was not with the Commission.*

> Accordingly, since it follows that the contract was not subject to renegotiation under the Act, it becomes unnecessary to consider the two remaining objections raised by petitioner." (Italics supplied.)

The Tax Court, by a final order, then ordered and decided: "That there is no renegotiable contract within Section 403 (c)(1) of the Renegotiation Act" (R. 302).

The Government then filed with the United States Court of Appeals for the District of Columbia Circuit a petition for a review of the Tax Court's redetermination of the basic "coverage" issue (R. 302-305).

The Court of Appeals, in the course of an opinion by Judge Prettyman, 211 F. 2d 675, noted initially that:

> "The first question is whether this court has jurisdiction to review the decision of the Tax Court in this matter. The statute provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." This court has held several times that in renegotiation cases it can review decisions of the Tax Court in respect to jurisdictional and constitutional questions only."

Turning then to a consideration of whether any of the questions in the Government's petition for a review raised such a "jurisdictional" question—for it was obvious that no "constitutional" question was involved—the court noted that in 1945 it had before it a renegotiation case which was strikingly similar to this one, *Waterman S. S. Corp.* v. *Land*, 80 App. D. C. 167, 151 F. 2d 292 (1945), reversed by this court on a point of administrative procedure, *sub nom.*, *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540

(1946). The court also pointed out that the basic facts in the earlier case, *i.e.*, the contract, the signatories, and the performance, were "identical in all material respects" to the present case, and then quoted the following excerpt from the decision of this court in that case:

> "Just as in the *Myers* case [303 U. S. 41], the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403(e)(1) of the Act provides that the Tax Court 'shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . .' Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act."

Continuing, the Court of Appeals said:

> "It is argued to us that the long passage which we have quoted was *dictum*. Whether it was or was not, we think we cannot disregard it. The problem now before us is precisely the problem involved in that discussion. The court said without qualification that what are and what are not negotiable contracts is a question of coverage and a part of the determination of the amount of excessive profits, as to which the Tax Court has exclusive jurisdiction. According to that statement, which we apply as written, this court has no jurisdiction to review the decision of the Tax Court upon the question whether the contract in controversy was or was not renegotiable. We do not understand the Supreme Court to have foreclosed review if requirements of due process were allegedly violated, but we do not have that question before us."
>
> * * * * * *
>
> It follows from the foregoing that this petition for review must be dismissed for lack of jurisdiction.

Nevertheless, purporting to find a conflict between the court's decision in this case and prior decisions of the *same* court in other cases, and proceeding under the provisions of Section 46(c) of the Judicial Code as construed by this court in the *Western Pacific Railroad* case, 345 U. S. 247 (1953), the Government filed a timely petition for a rehearing by the Court of Appeals, *en banc*, stating that it relied upon the following points as basis for a rehearing:

> 1. The decision of this Court in dismissing the petition for review has clearly misapplied the decision of the Supreme Court in *Macauley* v. *Waterman S.S. Corp.*, 327 U. S. 540 (1946).
>
> 2. The Court's decision in this proceeding is inconsistent with and contrary to all prior deci-

sions of this Court thereby resulting in confusion as to the extent to which this Court will review rulings of the Tax Court in renegotiation matters.

3. The issues raised in this proceeding were clearly restricted to a determination of whether or not the Tax Court had jurisdiction over respondent.

These points, it will be noted, are in substance the same as the first three reasons advanced by the Government in support of its petition for the issuance of a writ of certiorari by this court.

After taking the matter under advisement, all of the active circuit judges of the circuit, except Chief Judge Stephens who did not participate in the matter, entered the following order denying the Government's petition for a rehearing *en banc* (Petition, App. 32a-33a):

Before: STEPHENS, Chief Judge, and EDGERTON, CLARK, WILBUR K. MILLER, PRETTYMAN, BAZELON, FAHY, WASHINGTON, and DANAHER, Circuit Judges, in Chambers.

ORDER

United States Court of Appeals for the District of Columbia Circuit. Filed March 12, 1954. Joseph W. Stewart, Clerk.

Upon consideration of petitioners' petition for a rehearing in banc, and of respondent's answer thereto, it is

ORDERED by the Court that the aforesaid petition for a rehearing in banc be, and it is hereby, denied.

PER CURIAM.

Dated: March 12, 1954.

Chief Judge STEPHENS did not participate in the foregoing order.

The Government's petition for a review of the Tax Court's redetermination of the basic "coverage" issue having thus been twice rejected by the Court of Appeals, first by the division which wrote the original opinion, and later by the full court, sitting *en banc*, the Government nevertheless then filed the petition for a writ of certiorari which is now before this court. Once again, it contends, upon substantially the same grounds, that the decision of the Court of Appeals in this case is in conflict with prior decisions of the same court, and, therefore, that the petition for a review should not have been dismissed for want of jurisdiction.

In view of all these circumstances, we respectfully submit that the question presented in the petition is so unsubstantial as not to require further argument.

2. Another and equally compelling reason why the petition for a writ of certiorari filed herein should be denied is that it is not based upon any of the grounds enumerated in Rule 19(1) of this court, or on any grounds of like character. To the contrary, it will be noted that the Solicitor General does not contend, nor even suggest, that the decision below is erroneous, as a matter of law; nor does he indicate whether, if the petition were granted, he would urge that the decision be reversed. It is only reasonable to assume, therefore, that the Solicitor General is convinced that, as a matter of law, the decision below is correct and, if reviewed, that it should be affirmed. His only complaint seems to be that in *other* cases previously decided by the *same* court, aggrieved contractors and subcontractors have *erroneously*, been accorded more favorable treatment by the court. This is not true, but, even if it were, that would not constitute a valid

reason for asking this court to review a case which has been decided correctly and, admittedly, in accord with the Government's own consistent interpretation of the "finality clause" of the Renegotiation Act.

3. It is also apparent that the several reasons advanced by the Government in support of its petition to this court lack substantial merit, mainly because they are based upon an erroneous and strained analysis of the lower court's decision in this and prior cases.

First, the Government purports to find a conflict between the decision of the Court of Appeals in this case, decided by a division of the court consisting of Circuit Judges Clark, Prettyman, and Washington, and the decisions of other divisions of the same court, with a resulting "unequal application of the law" as between the Government and its contractors. In support of this contention the Government points out that the Court of Appeals for the District of Columbia Circuit has, *over the Government's opposition*, repeatedly insisted that it has power to review Tax Court renegotiation decisions on "constitutional" and "jurisdictional" grounds; and for that reason the Government felt justified in seeking a review of the Tax Court's determination that Respondent's charter was not renegotiable. But, the fallacy of this reasoning lies in the fact that, in order to bring its case within the scope of the lower court's self-imposed limited jurisdiction, as established by the court in prior decisions, it was necessary for the Government to contend that a determination by the Tax Court on a question of "coverage" was also a determination of a "jurisdictional" question and, therefore, reviewable. However, this contention was properly rejected by the Court of Appeals, for the reason that *this* court had already held

in *Macauley* v. *Waterman, supra*, that a determination as to whether a contract is or is not covered by the Act is an essential part in determining the amount of a contractor's alleged excessive profits, and, therefore, clearly within the jurisdiction of the Tax Court.

The Government also contends that the decision below results in "an unequal application of the law" as between the Government and its contractors, but there is simply no basis for such a contention. The reported decisions show that in all cases arising under the Renegotiation Act the Court of Appeals for the District of Columbia Circuit has uniformly applied the same rule, *i.e.*, that it will review only "constitutional" or "jurisdictional" questions, and that it will not review any question pertaining to the "amount" of a contractor's alleged excessive profits. The same rule was applied by the court in this case, with the result that the Government's petition for review was likewise dismissed for lack of jurisdiction, because it failed to raise any "constitutional" or "jurisdictional" issue.

But, even if it were true that the decision of the Court of Appeals in this case conflicts with other decisions of the same court in prior cases, that alone would not be a valid reason for granting a petition for a writ of certiorari. In such instances, the proper remedy, invoked by the Government in this proceeding, is the filing of a petition for a rehearing by the Court of Appeals, *en banc*. Then, if there is any such inconsistency or intra-circuit conflict of views, the full court will presumably resolve the conflict, in an *en banc* decision, or state publicly that the conflict cannot be resolved. In the latter event, it might be appropriate for this court to exercise its supervisory authority and resolve the conflict. But, where as in this case the supposed conflict is called to the attention of the court, by the filing of such a petition for a rehearing, *en*

banc, and a rehearing is denied by the court, *en banc,* it should be assumed either that the court did not consider that such a conflict existed, or that they were satisfied to let the most recent decision stand as the law of the circuit.

The second reason advanced by the Government in support of its petition is that the opinion below "misapplies" this court's language in *Macauley* v. *Waterman S.S. Corp.,* 327 U. S. 540, 544. This point was also raised by the Government in its petition for a rehearing *en banc,* and was presumably rejected by the court.

Moreover, an analysis of the decision below establishes that there is no basis whatsoever to support this alleged error. Actually, the question which the Court of Appeals was called upon to decide was relatively simple, and the answer was fairly obvious. By reason of a long line of cases, starting with *U. S. Electrical Motors, Inc.* v. *Jones,* 153 F. 2d 134, it is the settled law of the District of Columbia Circuit that the Court of Appeals' jurisdiction to review determinations of the Tax Court in renegotiation cases is limited, by the Renegotiation Act itself, to a review of questions pertaining to the constitutionality of the Act and the jurisdiction of the Tax Court, questions subsequently referred to by the court as "constitutional" and "jurisdictional" questions. Therefore, because it was obvious that no "constitutional" issue was involved, the only question to be decided by the court was whether the Government's petition for review presented a "jurisdictional" issue, and it was only in connection with that narrow point that the court referred to and applied the opinion of this court in *Macauley* v. *Waterman, supra,* which held that questions of "coverage" are vested by the Act within the "exclusive jurisdiction" of the Tax Court, "for a decision as to what are or are not negotiable contracts is an essential

part in determining the amount of a contractor's excessive profits."

The exclusive jurisdiction of the Tax Court to hear and redetermine questions of coverage—as an "essential part" of its power and duty to redetermine the amount, if any, of an aggrieved contractor's alleged excessive profits—having thus been settled by this court, it was apparent that the Tax Court had not exceeded its statutory jurisdiction in this case. Therefore, it was clear that the Government's petition for review did not present any "jurisdictional" issue, within the meaning of the lower court's prior decisions, and the petition for review was accordingly dismissed.

Any other interpretation of the lower court's application of *Macauley* v. *Waterman* would require a distortion of the opinion, particularly since the lower court specifically noted that in the earlier case this court had expressly stated that it was not deciding whether decisions of the Tax Court on coverage questions are "final".

As a third reason in support of the petition, the Government asserts that the division of the Court of Appeals which decided this case failed to appreciate that its decision is in conflict with prior decisions of other divisions of the same court. This point, as noted above, was specifically called to the court's attention, and if there ever was any doubt about it, it was resolved by the court below when, sitting *en banc*, it denied the Government's petition for a rehearing.

The fourth and last reason advanced by the Government in support of the petition is that now, some 12 years after the Act became effective, this court should establish uniform principles determining when decisions of the Tax Court may or may not be reviewed by the courts of appeals. Such a suggestion might well have had merit 10 years ago,

and the Government could probably have obtained such a ruling if it wanted it then. But, the Government effectively opposed all attempts to have this court pass upon the question, and there now appears to be no sound reason why this court should intervene at this late date, after all but a relatively few of the thousands of wartime contracts have been renegotiated without benefit of such uniform principles. If the Government believes that such a rule would be beneficial in the administration of the Renegotiation Act of 1951, as amended and extended to date, it should seek it in some case arising under that Act. Principles of procedure applicable to the administration of the 1942 Act would have little, if any, value in the administration of the later Acts.

In short, we submit, the reasons advanced by the Government in support of the petition for certiorari are not sufficient to sustain the petition.

4. Finally, we submit that the granting of a writ of certiorari in this case would serve no useful purpose. Section 403(c)(1) of the Renegotiation Act of 1942, as amended, specifically and without qualification provides that upon the filing of a petition for review with the Tax Court——

> ". . . such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as to the amount of excessive profits an amount either less than, equal to or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review

> the determination of the Board or the Secretary, but shall be treated as a proceeding *de novo*."

In view of this unequivocal language we do not believe there can be any reason to doubt that Congress intended the Tax Court to have not only *exclusive* jurisdiction, but also *unreviewable* jurisdiction, to redetermine the "amount" of any aggrieved contractor's alleged excessive profits. Therefore, since this court determined in *Macauley* v. *Waterman* that a determination as to what are or are not negotiable contracts is an essential part in determining the "amount" of a contractor's alleged excessive profits, it would seem to follow that redeterminations of such "coverage" questions by the Tax Court are equally final and unreviewable "by any court or agency," except, of course, where it is alleged that the Tax Court has *exceeded the limits* of its statutory authority.

Conclusion.

For the above reasons, Respondent respectfully submits that the Government's petition for a writ of certiorari should be denied.

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